

Office of Chief Counsel
Internal Revenue Service

memorandum

TL-N-1067-99

JForsberg

April 20, 1999 ?

date: ~~February 20, 1999~~

to: Chief, Examination Division, North Central District
Attn: Gary Goldsmith, Group Manager, Group 1220

from: District Counsel, North Central District, St. Paul

subject: ~~_____~~
Statute of Limitations on FISC Refund

Our advice has been requested as to whether a refund can be issued to _____ for its TYE _____ based on a redetermination of the commission expense payable to its FSC _____. For the reasons discussed below, we are of the opinion that issuance of the refund sought is precluded by Treas. Reg. 1.925(a)-1T(e)(4).

FACTS

_____ ("_____"), a _____ corporation, is a wholly-owned subsidiary of _____ ("_____"). _____ is a commission FSC. _____ and _____ have 52/53 week taxable years ending in _____. _____'s Form 1120 for the TYE _____ was filed on or about _____. _____'s Form 1120-FSC for the TYE _____ was filed on or about _____.

A Form 872 (Consent to Extend the Time to Assess Tax) extending the statute of limitations on assessment for _____'s TYE _____ to _____, was executed on behalf of the taxpayer and on behalf of the Commissioner on _____, and _____, respectively. A second Form 872 extending the statute to _____, was executed on _____, and _____, respectively. A third Form 872 extending the statute to _____, was executed on _____, and _____, respectively. All three Forms 872 were in the name of "_____ ("_____") and showed the EIN of _____. The signature blocks on the Forms 872 showed the taxpayer as "_____" and _____." The Forms 872 were signed by _____, Vice President of Tax. _____ is apparently also an officer of _____. _____ did not file a protective claim for refund for the TYE _____, nor was a separate Form 872 executed with respect to _____'s TYE _____.

On [REDACTED], [REDACTED] filed an amended Form 1120-FSC for its TYE [REDACTED] reflecting an increased profit resulting from a transaction-by-transaction regrouping of sales. The additional profit reflected on the amended Form 1120-FSC would give rise to an additional commission expense on [REDACTED]'s [REDACTED] Form 1120 of \$[REDACTED].

The taxpayer takes the position that the Forms 872 executed with respect to [REDACTED]'s TYE [REDACTED] encompass [REDACTED]'s TYE [REDACTED] as [REDACTED] is an affiliated company of [REDACTED].

DISCUSSION

As in effect for the year in issue, the regulations under section 925 permitted a FSC and its related supplier to redetermine the commission earned by the FSC even after the filing of their original returns, provided certain conditions were met. Treas. Reg. 1.925(a)-1T(e)(4) provided:

The FSC and its related supplier would ordinarily determine under section 925 and this section the transfer price or rental payment payable by the FSC or the commission payable to the FSC for a transaction before the FSC files its return for the taxable year of the transaction. ... In addition, a redetermination may be made by the FSC and related supplier if their taxable years are still open under the statute of limitations for making claims for refund under section 6511 if they determine that a different transfer pricing method may be more beneficial. Also, the FSC and related supplier may redetermine the amount of foreign trading gross receipts and the amount of costs and expenses that are used to determine the FSC's and related supplier's profits under the transfer pricing methods. Any redetermination shall affect both the FSC and the related supplier.

In Union Carbide Corp. v. Commissioner, 110 T.C. 375 (1998), the Tax Court addressed the issue of whether a related supplier could claim additional commission expenses based on a redetermination of the FSC's commissions where the supplier's statute of limitation for refund was open but the FSC's statute for refund was not. The taxpayer argued that Treas. Reg. 1.925(a)-1T(e)(4) allowed a redetermination so long as refund statute of the entity seeking the refund was open or, alternatively, that if the regulation required both the FSC's and the supplier's refund statutes to be open, that the regulation was invalid. The Tax Court rejected the taxpayer's arguments, holding that (1) Treas. Reg. 1.925(a)-1T(e)(4) allows a FSC and its related supplier to redetermine commissions only if the redetermination is made within the refund statute of both the FSC and the related supplier, and

(2) that Treas. Reg. 1.925(a)-1T(e)(4) is valid. Union Carbide Corp. v. Commissioner, 110 T.C. 375 (1998).

In the present case, the refund statute for [REDACTED]'s TYE [REDACTED] has been kept open by virtue of a series of statute extensions. [REDACTED]'s refund statute for the TYE [REDACTED], however, expired on or about [REDACTED], without the filing of a protective claim or the execution of a Form 872. Under Treas. Reg. 1.925(a)-1T(e)(4) and Union Carbide, no redetermination of [REDACTED]'s commission expense for the TYE [REDACTED] is permissible as [REDACTED]'s refund statute for that year has expired.

The taxpayer argues that the series of Forms 872 executed with respect to the TYE [REDACTED] encompass [REDACTED]'s TYE [REDACTED]. By their terms, however, the Forms 872 relate only to the income tax liability of "[REDACTED]." While [REDACTED] is a wholly-owned subsidiary of [REDACTED], as a foreign corporation it was not, and could not be, a member of the [REDACTED] consolidated group. I.R.C. § 1504(b)(3). Thus, Forms 872 relating to the [REDACTED] group do not encompass [REDACTED].

The taxpayer further argues that it intended the Forms 872 to apply to [REDACTED]'s TYE [REDACTED]. Whether the taxpayer intended or believed that the Forms 872 applied to [REDACTED]'s TYE [REDACTED] is a open question of fact which, in our view, is of no relevance. By their terms, the Forms 872 executed on behalf of the taxpayer were limited to the income tax liability of "[REDACTED]." Waivers of the statute of limitations on assessment are to be interpreted by looking to the "objective manifestations of mutual assent" as reflected in the written agreement. Schulman v. Commissioner, 93 T.C. 623, 639 (1998). A taxpayer's subjective intent is not relevant in interpreting the terms of a Form 872. Kronish v. Commissioner, 90 T.C. 684, 693-694 (1998). If in fact the taxpayer believed that the Forms 872 encompassed [REDACTED]'s TYE [REDACTED], such a belief would, at best, constitute a unilateral mistake of fact which would not change the terms of the Forms 872.

If you have any questions respecting this matter, please call Jack Forsberg at 290-3473, ext. 227.

REID M. HUEY
District Counsel

By: _____
JACK FORSBERG
Special Litigation Assistant

cc: Assistant Chief Counsel
(Field Service)